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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-6862

RAYMOND R. STONE,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Petitioner, Raymond R. Stone, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered in these proceedings on November 1, 1979.

OPINIONS BELOW

The opinion of the Florida Supreme Court on the direct appeal of the Petitioner's conviction and sentence which is reported as Stone v. State, 378 So.2d 765 (Fla. 1980) is attached as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on November 1, 1979. A timely Motion for Rehearing was denied on January 31, 1980. An Application for Extension of Time in which to file the Petition for Writ of Certiorari was timely filed in this Court and on April 11, 1980, Mr. Justice Powell granted an Extension of Time until

June 29, 1980 for the filing of the Peition. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3) Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the Florida Supreme Court, in affirming the imposition of the sentence of death in the present case has adopted such a broad and vague construction of the term "especially heinous, atrocious and cruel" as to violate the Eighth and Fourteenth Amendments to the United States Constitution.

2. Whether the application of the aggravating circumstance relating to murders committed by "a person under sentence of imprisonment" to support the imposition of the death penalty under the facts of this case constitutes a violation of Petitioner's rights under the Eighth and Fourteenth Amendments to the United States Constituion.

3. Whether the imposition of the sentence of death in this case upon the ground that it is "presumed to be the proper sentence" is tantamount to a mandatory death sentence and therefore violative of the Eighth and Fourteenth Amendments to the United States Constitution.

4. Whether the Petitioner's Pre-trial statement to the police was obtained in violation of his rights under the Fifth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand

Jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense twice be put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Eighth Amendment:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Fourteenth Amendment, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fla. Stat. Ann. 921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.- Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by §775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize

the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury. - After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (6), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death. - Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5) and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence. - The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances. - Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) Mitigating circumstances. - Mitigating circumstances shall be the following;

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. The issue of whether the aggravating circumstance relating to murders which are "particularly heinous, atrocious and cruel" can be constitutionally applied to the Petitioner under the facts of this case was raised by argument in the Florida Supreme Court and decided adversely to Petitioner by that Court.

2. The issue of whether the aggravating circumstance relating to murders which are committed "by a person under sentence of imprisonment" can be constitutionally applied to Petitioner under the facts of this case was raised by argument in the Florida Supreme Court and decided adversely to Petitioner by that Court.

3. The issue of whether the imposition of a sentence of death upon the ground that it is "presumed to be the proper sentence" is tantamount to a mandatory death sentence and

therefore violative of Petitioner's constitutional rights arose by the decision of the Florida Supreme Court.

4. The issue of whether Petitioner's pre-trial statement to the police was obtained in violation of his rights under the Fifth and Fourteenth Amendments was raised in a Motion to Suppress the statement filed in the Circuit Court for Union County, Florida. The Circuit Court denied the Motion and the Florida Supreme Court affirmed the judgment.

STATEMENT OF THE CASE

On July 11, 1975, a Circuit Court jury in Union County, Florida found the Petitioner, RAYMOND R. STONE, guilty as charged of the premeditated murder of one Jacqueline Joanne Smith. R-20.[1] The Trial Judge, accepting a Recommendation of death made by the same jury, R-21, adjudicated the Petitioner guilty and sentenced him to die in the electric chair. R-22. Both the conviction and sentence were affirmed on Direct Appeal to the Florida Supreme Court on January 31, 1980 in the judgment sought to be reviewed by this Petition. (Appendix A) Stone v. State, 378 So.2d 765 (Fla. 1980).

A. The Motion to Suppress

Petitioner made a formal tape-recorded statement on September 16, 1974, admitting his involvement in the offense to John Whitehead, the Sheriff of Union County and Agent Joe Eubehler of the Florida Department of Law Enforcement. MS-4, Tr-692. Counsel for the Petitioner moved to suppress the statement R-14-18 on the ground that it was obtained in vio-

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[1] In this Petition "R" is a reference to the one volume record of the pleadings and orders, "Tr." is a reference to the five volume trial transcript, "MS" is a reference to the transcript of the Motion to Suppress Hearing, "Pen.Tr." is a reference to the transcript of the penalty trial, and "S" is a reference to the sentencing transcript.

lation of Petitioner's Fifth Amendment rights. A pre-trial Evidentiary Hearing was held upon the Motion on June 27, 1975. MS-1-166.

Petitioner was called as a Witness on his own behalf and testified that he is thirty six years old and that he has a third grade education. MS-3. He explained that he was involved in an automobile accident in Missiouri and that the police officers there arrested him on August 31, 1974 when they learned of a detainer lodged against him for an unrelated Florida offense. MS-4,20.

Wayne C. Scott, a corrections officer with the Florida Department of Offender Rehabilitation, met Petitioner in Missouri on September 5, 1974 and together they flew to Tallahassee, Florida. MS-60. Petitioner was told that he was being taken to the Lake Butler Reception and Medical Center for further medical treatment. MS-6. He was also told that he was a suspect in a murder case but no details were furnished him. MS-28. Petitioner attempted to obtain an Attorney's address from Officer Scott, who had taken possession of his personal belongings, but Scott did not turn over the address. MS-5,8,29-32,63,64. The two arrived in Tallahassee and Petitioner was taken to the Leon County Jail where he remained for the next five or six days. He was not taken before a commiting magistrate during this period of time. MS-5. Thereafter, on September 10, 1974, Officer Scott took Petitioner to the Lake Butler Reception and Medical Center.

On several occasions during the day of September 10, Petitioner was questioned by Sheriff Whitehead and Agent Eubehler. He testifed that he again requested the telephone number of his attorney and that the officers, once again, failed to provide it. MS-10. He said that he officers explained that he did not need an attorney as he was not yet charged with an offense. MS-14,15.

At approximately 4:30 a.m. on September 16, 1974, Agent Eubehler and Sheriff Whitehead woke the Petitioner up and advised him that they were going to Orlando. He requested an attorney once again but the officers replied that it was too early in the morning. MS-12,42. Later that morning he was told that he was being taken to Orlando for a lie detector test pursuant to a court order. MS-12,13,47. He again asked for the telephone number of his attorney and was told that it would be given to him on the way back. MS-13,43.

After Petitioner arrived in Orlando, Charles Moniack, a special agent with the Florida Department of Law Enforcement, gave Petitioner a polygraph examintion. MS-15. Afterwards, Moniack told Petitioner, in his opinion, Petitioner was guilty of the murder of Jacqueline Smith. According to Petitioner's testimony, Sheriff Whitehead then told him that they had enough evidence to put him in the electric chair but that if he cooperated, the officers would speak on his behalf to the State Attorney. MS-16,17,48. Although Petitioner was not advised of his rights at this time, MS-18-20, he made a statement admitting his involvement in the offense. MS-17. An hour later a tape recording of the confession was made and another recorded statement was made on September 18, 1974. MS-18,23. Petitioner was finally allowed to call the attorney on the way back to the prison from Orlando after he had already made the confession. MS-20,21,53.

Agent Wayne Scott testified when he arrived in Missouri to take Petitioner into custody, he was told that Petitioner was a possible suspect in a murder case and that he should seize all of his personal belongings as evidence. MS-61. On the way back to Florida, Petitioner twice asked the Agent for a business card that bore the name of an attorney. MS-63. When he returned, Scott informed Sheriff Whitehead

and Agent Eubehler concerning Petitioner's request to obtain the name and telephone number of his attorney. MS-64,69.

Sheriff Whitehead confirmed the fact that the polygraph test was administered to Petitioner on the morning of September 16, 1974, MS-80, but he said that Petitioner had indicated that he wanted to take the test MS-100. The Sheriff conceded that the Petitioner had asked to call an attorney but explained that the call was supposed to have been about the automobile accident in Missouri. MS-85. He was not concerned about arresting Petitioner at that time as he was already in custody on the other charge. MS-97.

Agent Eubehler confirmed Petitioner's testimony that the polygraph examiner told him in the presence of the officers that he thought he was guilty of the murder. Eubehler said that he advised Petitioner of his rights on many occasions during the day but that he apparently did not do so immediately prior to the confession which was immediately following the confrontation by the polygraph examiner. MS-118. His testimony concerning Petitioner's request for an attorney was essentially the same as that of Sheriff Whitehead. MS-120.

At the close of the testimony, the Trial Court Judge entertained arguments and found by the greater weight of the evidence "that the confession was freely and voluntarily made." MS-154. Accordingly, the Motion to Suppress was denied. MS-165.

B. The Trial

Petitioner was employed as a farm laborer in May of 1974 by the victim's husband, Marvin Smith. Tr. 239. From the time he was hired until the time of the commission of the

offense on September 23, 1974, he lived on the premises, Tr-241, and assisted Smith in the harvesting of a small tobacco field. Tr-239-241.

At 2:30 a.m. on the morning of October 23, Marvin Smith woke up and discovered that his wife, Jacqueline, who was due home from her job at approximately 12:30 a.m., had not returned from work. Tr.251 He got out of bed and drove his truck down to her place of employment, but he was unable to locate her 1974 green Ford automobile, Tr - 252, or to otherwise ascertain her whereabouts.

Later that morning at approximately 7:00 a.m. another farm worker came by to tell Smith that he had seen the green Ford parked unattended in a nearby field. Tr-368,376. Law enforcement officers were called to the scene and found a broken key chain on the floorboard of the car, Tr - 404, and scuff marks on the ground nearby. Tr-402. Petitioner did not return to work and was apparently last seen on the morning of August 23, attempting to purchase gasoline. Tr-361.

On September 1, 1974, two men traveling down the Santa Fe River by canoe discovered the torso of a body approximately one half mile from a bridge near the south bank of the river Tr-433,434,441. They immediately contacted the Union County Sheriff, Tr-436, who came out to the river with an ambulance driver to retrieve the body. Tr-419,421,422. A diving team was dispatched to the scene and one of the divers located a human skull approximately 150 yards from the bridge. Tr-473,476,478. Police officers also removed a dark red stain, later identified as human blood from the bridge. Tr-448,449.

The medical examiner compared a surgical scar and X-rays made during the autopsy, to the medical records of the suspected victim and testified that he believed the body to be that of Jacqueline Smith. Tr-596. His examination of the

skull led him to believe that trauma to the skull bone occurred near or at the time of death. Tr-603,604. He identified three injuries to the skull, any one of which would have been sufficient to cause death. Tr-605.

The State established the Petitioner's involvement in the offense by introducing into evidence the tape recorded statement he made to Sheriff Whitehead and Agent Joe Eubehler on September 16, 1974. Tr-692. The statement serves as the only explanation as to how the offense was actually committed.

Petitioner told the officers that he had been smoking marijuana and drinking a considerable amount of beer on the evening of August 22, 1974, when Jacqueline Smith pulled up in the green Ford alongside his vehicle. Tr-692-727. She apparently decided to join him for a while and proceeded to park her car where her husband would not be able to find it. Tr-724. She walked back to Petitioner's car and the two drove out to the bridge over the Santa Fe River. Tr-727. As she was getting out of the car, Petitioner grabbed a hatchet which he had placed in the back seat, Tr-722, and struck her on the head. She fell to the ground and Petitioner picked her up and dumped her over the bridge. Tr-728. He got back into the car and proceeded to a truck stop to attempt to get more marijuana. Tr-732. Petitioner told the officers that when the effect of the beer and marijuana began to wear off, he realized that he was in trouble. Tr-732. He explained that he did not plan on killing Jacqueline Smith, but that he had just "lost his head" at the time. Tr-750.

Petitioner did not testify in his own behalf at Trial. Following closing arguments by the parties, Tr-909-981, and the Court's instructions on the law, Tr-982-1010, the Jury returned a verdict, Tr-1012, finding Petitioner guilty

as charged of premeditated murder in the first degree.

C. Sentencing

The penalty portion of the bifurcated trial was held before the same jury on July 11, 1975, seven days after the guilty verdict, Pen.Tr. 1-82. The parties were permitted to introduce evidence in aggravation and mitigation in accordance with the procedures set forth in Fla. Stat. Ann. 921.141(1).

The State introduced a document demonstrating that Petitioner was sentenced to serve ten years imprisonment for robbery in 1963. Pen.Tr. 419. The Prosecution also introduced a document indicating that in 1970, Petitioner was convicted and sentenced to serve a term of years for having committed a "crime against nature". Pen.Tr. 4,15,19. Finally, a document referred to as a "retake order" was introduced for the purpose of demonstrating that a judgment of an intermediate appeals court vacating Petitioner's sodomy conviction had been reversed prior to the commission of the instant offense. Pen.Tr. 5,20.

Petitioner Stone took the witness stand on his own behalf and stated that he was thiry six years old and had a third grade education. Pen.Tr. 6. He outlined a life of confinement in prisons and mental hospitals dating back to a time when he was first placed in a juvenile correctional institution at the age of twelve. Pen.Tr. 6-11. He told the Jury that he had not been in contact with his father or his brothers or sisters since 1955. Pen.Tr. 10,11.

Following the presentation of this evidence, Counsel made arguments to the jury. Pen.Tr. 11-56. Petitioner's attorney objected to the State's argument that the Petitioner was "under sentence of imprisonment" at the time of the comission of the offense. Pen.Tr. 66. The basis of the ob-

jection was that although an appeals court decision vacating the judgment and sentence had been reversed and the original sentence reinstated, Petitioner was not actually recommitted until after the commission of the homicide, and was not therefore "serving" the sentence. Pen.Tr.66. The objection was overruled. Pen.Tr. 68.

The Trial Judge instructed the jury on the law relating to the aggravating and mitigating circumstances, Pen.Tr. 56-63, after which a majority of the jury recommended that the Petitioner be sentenced to death. Pen.Tr. 78.

On October 1, 1975, the Trial Court accepted the Jury's recommendation and sentenced the Petitioner to death. S-18. The Court found as aggravating circumstances: (1) that the crime was committed while the Defendant was under a sentence of imprisonment, (2) that the Defendant was previously convicted of a felony involving the use or threat of violence and (3) that the murder was especially heinous, atrocious and cruel. S-15. The Trial Judge further found that there [were] "insufficient mitigating circumstances to outweigh the aggravating circumstances". S-17.

D. The Direct Appeal

Petitioner's judgment and sentence were affirmed on November 1, 1979, in a Direct Appeal to the Florida Supreme Court. (Appendix A), Stone v. State 378 So.2d 765 (Fla 1980). A timely Petition for Rehearing was denied on January 31, 1980.

The Court, in affirming the conviction, rejected Petitioner's contention that the confession was admitted into evidence in violation of his Fifth and Sixth Amendment rights. The sentence of death was affirmed upon a holding that the Trial Judge properly found each of the three aggravating circumstances enumerated in his Order, and that in

the absence of any mitigating circumstances, "death is presumed to be the proper sentence." 378 So.2d at 772.

REASONS FOR GRANTING THE WRIT

ONE

THE FLORIDA SUPREME COURT, IN AFFIRMING THE IMPOSITION OF THE SENTENCE OF DEATH IN THE PRESENT CASE HAS ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF THE TERM "ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL" AS TO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUION.

This case presents a question that is ripe for determination after this Court's decision in Godfrey v. Georgia, ___ U.S. ___, 48 L.W. 3542 (May 19, 1980). In that case, the Court granted certiorari to determine wether the Georgia aggravating circumstance relating to murders which are "outrageously or wantonly vile, horrible or inhuman..." was unconstitutionally applied by the Georgia Supreme Court. Although that aggravating circumstance was upheld on its face in Gregg v. Georgia, 428 U.S. 153 at 201 (1976) in view of the then existing Georgia decisions limiting its application, a plurality of the Court in Godfrey determined that the imposition of the death penalty in that case constituted a departure from the constitutionally permissible narrowing construction previously placed upon the law by the Georgia Courts. The constitutional problems involved in the application of an essentially subjective aggravating circumstance such as the one considered in Godfrey are even more acute in Florida.

This Court upheld the term "especially heinous, atrocious and cruel", contained in Fla. Stat. Ann. §921.141(5)(h) in Proffitt v. Florida, 428 U.S. 242 (1976) against a challenge of vagueness and overbreadth, but only because the few existing decisions of the Florida Supreme Court cured

whatever constitutional defects may have existed in the term by construction. Id at 254. Petitioner respectfully submits that the application of the subsection 5(h) aggravating circumstance in this case was unconstitutional in violation of his Eighth and Fourteenth Amendment Rights, first because the facts of the case cannot constitutionally support an application of the circumstance; and secondly, because the construction placed upon the term by the Florida Supreme Court in all of the death penalty cases decided in the nearly four years since Proffitt has rendered the meaning of the term vague and overbroad.

Consideration of the first argument must begin with the Florida Supreme Court's definition of the term "especially heinous, atrocious and cruel." The phrase was initially defined in State v. Dixon, 283 So.2d 1 (Fla. 1973) as follows:

> "...it is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that, cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission acts as to set the crime apart from the norm of capital felonies - the conscienceless or pitiless crime which is unnecessarily torturous to the victim." id at 9.

It would seem from the definition made by the Court that the aggravating circumstance could not apply in a case such as this one where the victim, who was unaware of impending death, died instantly as a result of the wound inflicted by the Petitioner. Indeed, the Supreme Court of Florida has held the aggravating circumstances to be inapplicable in cases where the victim died quickly as a result of a fatal injury and does not otherwise suffer physical or psychological pain prior to the time of death, see Cooper v. State, 336 So.2d 1133 (Fla. 1976), Kampf v. State, 371 So.2d 1007 (Fla. 1979), and Fleming v. State, 374 So.2d 954 (Fla. 1979).

Nothing in the record of these proceedings, however, could be fairly read to support a finding that the Petitioner

had a "[design] to inflict a high degree of pain" or that the murder was "unnecessarily torturous to the victim". The Petitioner's confession, relied upon the State as the principal evidence of his involvement in the offense, indicates that he struck the victim on the head with the blunt end of a hatchet at a time when she was apparently unaware of her fate. Tr-727. The Medical Examiner testified that his examination of the skull indicated the presence of a trauma resulting from a severe blow to the head, sufficient to cause the death of the victim. Tr-604,605.

While the condition of the corpse after approximately one week in the Santa Fe River is unpleasant to say the least, the Florida Courts have squarely held that events occurring subsequent to the death of the victim cannot be used to support a finding that the murder was "especially heinous, atrocious and cruel". See Halliwell v. State, 323 So.2d 557 (Fla. 1975). Since there was no evidence in this case that the victim suffered physically or psychologically prior to the time of death, it cannot be said that the murder was "especially heinous, atrocious and cruel" .

For these reasons, it is clear that the decision of the Florida Supreme Court sought to be reviewed by this Petition constitutes an impermissible departure from the narrow construction of the term "especially heinous, atrocious and cruel" originally approved by this Court in Proffitt v. Florida, supra. Assuming the application of subsection 5 (h) can be valid under some circumstances, as was recognized by the Court in Proffitt, it cannot be applied consistently with the Eighth and Fourteenth Amendments under the facts of this case.

The second branch of the argument, i.e. that the Florida Supreme Court has rendered the term "especially heinous, atrocious and cruel" vague and overbroad by the various and diverse constructions placed upon it in the four years since

Proffitt, presents a problem which is deserving of this Court's attention. A resolution of the constitutional issue by this Court would not only have significance to the individual fate of the Petitioner, but it would have a broad impact upon a widespread constitutional deficiency in the administration of the death penalty in Florida.

Before this Court decided Proffitt v. Florida supra, the Florida Supreme Court placed a narrow construction on the term "especially heinous, atrocious and cruel" and was extremely selective in its application. The Court rejected the application of the aggravating circumstance even in cases which seemed to contain the elements of the definition stated in Dixon v. State, supra. For example, in Swan v. State, 322 So.2d 485 (Fla. 1975), where the Defendant entered the victim's home, beat her, bruising her body severely, and tied her up with bed sheets in such a way that death would result from choking or strangulation, all of which ultimately did cause her death, the Court held that the aggravating circumstance was not proven. Similarly, the Court rejected the aggravating circumstance in Halliwell v. State, 323 So.2d 557 (Fla. 1975) where the Defendant beat the victim with a nineteen inch breaker bar until he sustained fatal injuries to the brain and then mutilated his body by dismembering it with a saw and fishing knife.

The State Court decisions in the intervening years since Proffitt, however, clearly indicate that the definition has been expanded. For example, in Gibson v. State, 351 So. 2d 948 (Fla. 1977), where the only evidence pertaining to the death was that the Defendant shot the victim three times, the Court held that the aggravating circumstance applied. Likewise, in Harvard v. State, 375 So.2d 833 (Fla. 1978), a death caused instantly by a single shotgun blast to the neck was characterized as "especially heinous, atrocious and cruel".

Part of the original definition of "especially heinous,

atrocious and cruel" contained in State v. Dixon, supra was; that conduct which is "unnecessarily torturous to the victim". Now it appears from the decisions of the Florida Supreme Court that a murder can be "heinous" if the killing itself was not necessary. See Hargrave v. State, 366 So.2d 1 (Fla. 1978) and Ford v. State, 374 So.2d 496 (Fla. 1979). Thus it appears that the Court has substituted the lack of justification for the offense, an element which would appear to exist in any murder case resulting in a conviction, for the requirement that death be inflicted in such a manner that it is cruel to the victim.

Another aspect of the Florida Supreme Court's post Proffitt construction of subsection 5(h) is the tendency on the part of the Court to find the existence of the aggravating circumstance on facts which are necessary to prove the offense. This type of duplication clearly occurred in Raulerson v. State. 358 So.2d 826 (Fla. 1978) where the Court found that the homicide was particularly heinous, atrocious and cruel because it was committed in a cold and calculated fashion". It is difficult indeed to determine what that language adds to the premeditation required to prove the murder in the first instance.

An examination of all of the post Proffitt Court decisions reveals that there is absolutely no discernable pattern to the manner in which the subsection 5(h) aggravating circumstance is applied. Even the cases which appear to raise identical questions are disposed of inconsistently with each other. In Riley v. State, 366 So.2d 19 (Fla. 1978), the Court rejected a subsection 5(h) finding by the lower Court in a case where the defendant shot the victim's son who was apparently left to watch his father die, on the ground that it can only apply to acts committed against the victim of the homicide. However, in Gibson v. State, 351 So.2d 948, (Fla. 1977), the Court held that the murder of the victim was par-

ticularly heinous, atrocious and cruel because the defendant had also shot another person who was left lying in the gutter. The attempt to reconcile these decisions demonstrates the validity of the often stated criticism of subsection 5(h) that it could be applied to any case.

The argument that subsection 5(h) has been used as a "catch-all" aggravating circumstance to cover a multitude of situations is demonstrated most effectively by an examination of the frequency with which it has been used. Since Proffitt there have been fifty murder cases decided in the Supreme Court of Florida wherein the Court actually reached the issue of sentencing. In forty three of these cases, the judgment and sentence of death in the Trial Court was based in whole or in part upon a finding that the murder was "especially heinous, atrocious and cruel".[2]

The fact that subsection 5(h) is only one of eight aggravating factors[3] and it appears to have been used to support approximately eighty six percent of the lower Court judgments imposing the death penalty, should be alarming in view of the fact that the aggravating circumstance is designed to represent the exception and not the rule. As Mr. Justice White noted in Furman v. Georgia, 408 U.S. at 313, a capital sentencing scheme must provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not". Although

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[2] The cases are listed in the Table attached as Appendix B.

[3] In 1979, the Florida Legislature added a ninth aggravating circumstance which is as follows: The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Fla. Stat. Ann. 921.141(5)(i).

the Florida Supreme Court said in Lewis v. State, 377 So. 2d 640 (1979), that the aggravating circumstance under review should only be used in cases wherein the murder is especially heinous, the facts demonstrate that it has been used in an overwhelming percentage of the cases.

The final constitutional deficiency in the application of subsection 5(h) is found in the Florida Court's failure to explain, in many cases, why the circumstance applies or does not apply. In Holmes v. State, 374 So.2d 944 (1979), the Trial Court failed to explain the reason for its subsection 5(h) finding. The Florida Supreme Court affirmed the judgment without giving its own analysis of the application and held that a finding in support of the death penalty need not be made according to any prescribed form. Likewise, in Brown v. State, 381 So.2d 690 (1980), the Court affirmed a finding that the murder was "particularly heinous, atrocious and cruel" without explaining its reason for doing so. Ironically, the Court in Brown made the following observation in affirming its finding that the aggravating circumstance applied:

> "...given the imprecision of the criteria set forth in our capital punishment statute, we must test for reasoned judgment in the sentencing process rather than mechanical tabulation to arrive at a net sum." id at 696.

The refusal to explain the reason for applying or not applying an aggravating circumstance on the ground that the law is "imprecise" and therefore the Court should made a "reasoned judgment" perpetuates the constitutional deficiency identified in Furman v. Georgia supra..

For each of the foregoing reasons, the Petitioner respectfully submits that the Florida Supreme Court, in affirming the imposition of the sentence of death in the present case has adopted such a broad and vague construction of the term "especially heinous, atrocious and cruel" as to violate his rights under the Eighth and Fourteenth Amendments.

TWO

THE APPLICATION OF THE AGGRAVATING CIRCUMSTANCE RELATING TO MURDERS COMMITTED "BY A PERSON UNDER SENTENCE OF IMPRISONMENT", TO SUPPORT THE IMPOSITION OF THE DEATH PENALTY UNDER THE FACTS OF THIS CASE, CONSTITUTES A VIOLATION OF PETITIONER'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUION.

The finding of the Trial Court that the murder was committed "by a person under sentence of imprisonment", S-15, was affirmed by the Florida Supreme Court, (Appendix A) Stone v. State, 378 so.2d 765 (Fla. 1980), in the judgment sought to be reviewed by this Petition. For the reasons which follow, Petitioner respectfully submits that the Florida Court improperly applied this aggravating circumstance in violation of his Eighth and Fourteenth Amendment rights.

Petitioner's conviction for a "crime against nature" which gave rise to the "sentence of imprisonment" referred to by the Trial Judge was vacated in a Federal Habeas Corpus proceeding. See Stone v. Wainwright 478 F.2d 390 (5th Cir. 1973). While Petitioner was at liberty, this Court reversed the decision of the Fifth Circuit Court of Appeals. Wainwright v. Stone, 414 U.S. 21 (1973). It is conceded that the reinstatement of the conviction resulting from this Court's decision occurred prior to the commission of the instant offense, but there is no evidence in the record to indicate that Petitioner was ever recommitted or that he was even aware of the fact that the conviction and sentence had been reinstated. Under these facts it cannot be said that Petitioner was "under sentence of imprisonment".

The aggravating circumstance referred to in Fla. Stat. Ann. 921.141(5)(a) obviously refers to those persons who have committed a capital felony while serving "a sentence of imprisonment". This common sense interpretation of the statute, although rejected by the Florida Supreme Court below,

is supported by its earlier decision in State v. Dixon, 283 So.2d 1 (Fla. 1973), the first case to define the aggravating and mitigating circumstances contained in the Florida capital Penalty statute. The following language of Dixon indicates that the term "under sentence of imprisonment" refers to prisoners:

> "...The aggravating circumstances of Fla. Stat. §921.141(6) S.S.A., actually define those crimes, when read in junction with Fla. Stat. §782.04(1) and 794.01 (1), FSA-to which the death penalty is applicable in the absence of mitigating circumstances. As such they must be proved beyond a reasonable doubt before being considered by Judge or Jury.
>
> Considered in that vein, Fla.Stat. 921.141(6), subsections (a) and (b) FSA. prescribe the death penalty for a capital felony committed by a prisoner or by one previously convicted of a capital felony. These conditions present two situations wherein the death penalty has been determined by the Legislature to be applicable absent overriding mitigating factors..." id at 9 (emphasis supplied)

It could hardly be argued that a man who is released from prison pursuant to a Court Order vacating his conviction is a "prisoner". Nor can it be said that he is a "prisoner" because the Order is later reversed by a higher Court. In this case, there is no evidence that Petitioner was serving the sentence either in actual custody or on parole, that he was an escapee, that he was a fugitive, or that he was even aware of the fact that he would ultimately be recommitted.

The application of the subsection 5(a) aggravating circumstance by the Florida Supreme Court is not only inconsistent with the Dixon definition of the statute, but it cannot be squared with the Court's more recent ruling in Ford v. State, 374 So.2d 496 (Fla. 1979). In that case, the Trial Judge found that although the Defendant was "not imprisoned" he was on probation for a felony offense and therefore "under sentence of imprisonment", Ford at 500,501. The Florida Supreme Court without explanation held that the Trial Judge was incorrect in his application of the aggravating circumstance.

The Florida Court's application of the subsection 5(a)

aggravating circumstance under the facts of this case, not only contravenes the plain meaning of the law, but it is inconsistent with the definition of the law contained in Dixon and its application in Ford. The death penalty surely cannot be applied consistently with the Eighth and Fourteenth Amendments, if the application to the facts upon which it depends varies from one case to the next.

Petitioner respectfully submits that the Court should grant Certiorari to correct the unconstitutional application of the aggravating circumstance contained in Fla. Stat. Ann. §921.141(5)(a), which purports to justify the imposition of the sentence of death in this case.

THREE

THE IMPOSITION OF THE SENTENCE OF DEATH IN THIS CASE UPON THE GROUND THAT IT IS "PRESUMED TO BE THE PROPER SENTENCE" IS TANTAMOUNT TO A MANDATORY DEATH SENTENCE AND THEREFORE VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Supreme Court approved the finding of each of the aggravating circumstances made by the Trial Court and affirmed the sentence of death on the following conclusion:

> "...Inasmuch as the Trial Court found these other aggravating circumstances, and no mitigating circumstances, death is presumed to be the proper sentence. State v. Dixon, 283 So.2d 1 (Fla. 1973).

Petitioner respectfully submits that the imposition of the death penalty on the ground that it is "presumed" to be the proper sentence is contrary to the Florida Capital Sentencing statute, and constitutes a form of mandatory death sentencing previously disapproved by this Court.

The Florida Capital penalty statute held constitutional by this Court in Proffitt v. Florida, supra. does not contain any presumption as to the proper sentence. Fla. Stat. Ann.

921.141. The general penalty statute, Fla. Stat. Ann. 775.082 provides however,

> "Penalties
>
> (1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 years before becoming eligible for parole unless the proceedings held to determine sentence according to the procedure set forth in s.921.141 results in findings by the court that such person shall be punished by death..." (emphasis supplied)

Thus the presumption from the sentencing statute is for a sentence of life, not death. Moreover, upon a finding of one or more aggravating circumstances, death may be a proper sentence but not the proper sentence. Lockett v. Ohio, 438 U.S. 586 (1978). The judicicially created presumption of death stated in Dixon and actually employed in this case conflicts directly with the decision of this Court in Woodson v. North Carolina, 428 U.S. 280(1976) prohibiting mandatory death sentences.

The unrebutted presumption which caused the imposition of the death penalty in this case upon the finding of an aggravating circumstance, is no different from the previously disapproved procedure of incorporating the aggravating circumstance into the elements of proof of the offense and providing for a mandatory death sentence. Roberts v. Louisianna 428 U.S. 325 (1976). In either case the sentence inevitably results merely from proof of homicide containing certain elements of aggravation.

It could be argued that the Supreme Court of Florida does not have to follow its own presumption in a given case, and therefore the presumption does not result in a sentence which is truly mandatory. The force of that argument dissapates, however, in a case such as this one, where the court by its own opinion mechanically applied the presumption to affirm the sentence of death. The Florida courts have not indicated in any respect that they are empowered to disregard

the presumption, or to exercise the discretion not to follow it in a case where no statutory mitigating circumstances have been shown.

Petitioner believes that the judicially created "presumption" that death is the proper sentence violates the Eighth and Fourteenth Amendments. The automatic application of the death penalty is, under any circumstance, contrary to Woodson, Roberts, and Lockett, and every constitutional principle this Court has labored to establish in the years since Furman v. Georgia. The issue is one which cannot be fully developed within the scope of this Petition, but should be fully briefed by the parties, and given plenary consideration by this Court.

FOUR

PETITIONER'S PRE-TRIAL STATEMENT TO THE POLICE WAS OBTAINED IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The statement made by the Petitioner, a man with a third grade education and a demonstrated history of mental illness, was given to the police sixteen days after he was initially taken into custody.[4] It is conceded in the decision of the Florida Supreme Court below that during this period of time, he made several requests to talk to a lawyer, Stone v. State, 378 So.2d at 769.[5] Despite the fact that

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[4] Petitioner was taken into custody in Missouri on August 31, 1974 MS-4. The incriminating tape recorded statement introduced at trial was given on September 16, 1974. MS-80-83, 111-114, Tr-692

[5] The fact that Petitioner had made a request to see an attorney at various times during the sixteen day period, was confirmed by each of the three police officers who testifed at the pretrial Motion to Suppress, MS-63,64,85,120. Both of the officers involved in the actual taking of the statement have conceded that he was not actually provided with the opportunity to call his attorney until after the statement was tape recorded. MS-85,86,120.

Petitioner was not at any time taken before a committing magistrate, and despite the officer's admission that he failed to repeat the six day old Miranda Warnings[6] prior to the time the statement was given, the Florida Court held that there was no violation of the Fifth Amendment. For the reasons which follow, it is respectfully submitted that the Florida Court committed a serious constitutional error which should be corrected by this Court.

The Supreme Court of Florida reasoned that there was no violation of Petitioner's Miranda Rights because it appeared to the officers that the request for counsel was made for some purpose other than the subject of their interrogation. Stone v. State, 378 So.2d at 769. This unprecedented decision finds no support in the federal decisions interpreting the Fifth Amendment and appears to be contrary to the principles set forth by this Court in the Miranda decision.

The Court specifically held in Miranda v. Arizona, 384 U.S. 436 (1966), that the authorities must terminate their interrogation if the accused indicates his desire to speak with an attorney. No part of the decision can be fairly read to allow the police to make judgments about the reason for the request or to disregard the request when they are of the opinion that it does not relate to the investigation. On the contrary, the Court noted in Miranda:

> "...The Defendant may waive effectuation of these rights provided the waiver is made voluntarily, knowingly, and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning..." 384 U.S. at 444,445 (emphasis supplied).

While the failure to allow Petitioner to call his

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[6] Petitioner was advised of his rights several times during questioning which occurred on September 10, 1974. MS-118 but the warnings were not repeated before the incriminating statement given on September 16, 1974. MS-118

attorney could alone substantiate a claim that the statement was given in violation of the Fifth Amendment, it appears in this case, that the statement is inadmissible as well for the reason that Petitioner was never taken before a committing magistrate. The Florida Rules of Criminal Procedure clearly provide that "every arrested person shall be taken before a judicial officer within twenty four hours of his arrest." Fla. R. Crim. P. 3.130(b)(1). And it is now well settled that the failure to adhere to a State rule requiring that the accused be taken before a magistrate can constitute a violation of his Federal Constitutional rights. Clewis v. Texas, 386 U.S. 707 (1967).

The apparent reason for the failure to provide Petitioner with a first appearance hearing in accordance with the State rule was that he was arrested upon a recommittment Order for an unrelated offense. The record is clear, however, that Petitioner was the prime suspect in the homicide at the time he was arrested. Sheriff Whitehead told local law enforcement officers to be on the lookout for the Petitioner just hours after the disappearance of the victim. MS-77. Agent Scott, who traveled to Missouri to take custody of the Petitioner, was advised to gather all of his personal belongings for use in the homicide investigation. MS-61. Finally, it appears that the questioning sessions which occurred throughout most of the day on September 10, 1974 dealt exclusively with the investigation of the offense. MS-7-12. Under the circumstances, the fact that the Defendant was technically arrested on an unrelated warrant cannot operate to relieve the authorities of their responsibility to provide a first appearance hearing. To do so would be in contravention of the very purpose of the state procedural rule and the decision of this Court in Miranda v. Arizona, supra, which prompted its adoption.

This case also presents a serious question as to whether the Miranda warnings were actually given at the required time. The officers no doubt gave Petitioner his Miranda warnings on several occasions during the questioning sessions which occured on September 10, 1974, MS-118. but in each of these interviews, Petitioner denied any involvement in the offense. MS-80. Although it appears from the decision of the Supreme Court below that Petitioner was advised of his rights "on the afternoon of September 16,", 378 So.2d at 769, it is clear from the record that he had already made his incriminating statement at that time. The fact that Petitioner was not advised of his rights prior to the time he gave the statement is established by the following testimony of Agent Eubehler:

> Q: Alright, now getting back to that same crucial time period, that is before you went on the spool tape or the tape that was in the room in which Mr. Stone agreed to go on tape. Was there a time period in which Mr. Stone made a statement implicating guilt and knowledge of the death of Jacqueline Joanne Smith. Something to the effect of "alright, I did it," or "alright, I killed her."?
>
> A. Yes. Shortly after Agent Moniack left within just minutes, he said, "alright, I killed her."
>
> Q. Well, was there anything leading up to that?
>
> A. Oh, yes, we talked to him.
>
> Q. About how long before he made that statement?
>
> A. I would say a couple of minutes.
>
> Q. Alright. Prior to his making that statement from the time Mr. Moniack left, up until that time, was he at any time either orally given his miranda rights and warnings and did he make a waiver or did anyone have him sign any written rights or waiver?
>
> A. Well, let me go back. I advised him on multiple occasions on the tenth. I was present that morning when he was advised of his rights and a short time earlier when I went back in after the polygraph. I then did not advise him of his rights. No, sir. MS-112,113,117-118.

The tape recorded statement made about an hour later indicates that the officers advised Petitioner of his rights

but at that time he had already confessed to the police officers in an interrogation which by their own admission failed to comply with Miranda.

The decision of the Supreme Court of Florida strains to resolve each of the foregoing arguments against Petitioner to reach the conclusion that the statement was admissible. An application of the most fundamental Fifth Amendment principles, however, leads inescapably to the conclusion that the statement was taken in violation of Petitioner's constitutional rights and should not, therefore, have been used against him.

CONCLUSION

For all the reasons state above, Petitioner respectfully requests that this Court grant a Writ of Certiorari to the Supreme Court of Florida.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

Raymond R. STONE, Appellant,

v.

STATE of Florida, Appellee.

No. 48275.

Supreme Court of Florida.

Nov. 1, 1979.

Rehearing Denied Jan. 31, 1980.

Defendant was convicted of murder in the first degree, and from the judgment of the Circuit Court, in and for Union County, John J. Crews, J., the defendant appealed. The Supreme Court, Adkins, J., held that: (1) the record including case in selecting jury was evidence that change of venue was not required; (2) denial of motion that each prospective juror be examined individually with others absent was not an abuse of discretion; (3) a request for counsel for unrelated purpose is not sufficient to require interrogation to cease under *Miranda*; (4) defendant's confession was freely and voluntarily made and there were no *Miranda* violations; (5) evidence of pieces of bone, blood samples, and expert testimony relating to exhibits was properly admitted; (6) the taped confessions played to jury did not deny due process of a fair trial on theory that they were played before State had established corpus delicti; and (7) under the record, sentence of death was proper.

Affirmed.

1. **Criminal Law** ⇐1044.1(1), 1045

Defendant's failure to file a motion for change of venue during trial precluded appellate review since appellate court must confine itself to review of only those questions which were before the trial court and upon which a ruling adverse to defendant was made.

2. **Criminal Law** ⇐108(1)

The defendant has constitutional right to trial where the offense occurred and a change of venue granted without an appropriate motion or the consent of defendant is of doubtful validity.

3. **Criminal Law** ⇐134(1)

Where record in murder prosecution disclosed that of 37 prospective jurors only two were excused because they had formed an opinion, and 23 prospective jurors indicated that they had heard something about the case, there had been news coverage, but there was no indication that any of the coverage was prejudicial, the case in selecting the jury was evidence that a change of venue was not required.

4. **Jury** ⇐131(13)

Denial of motion that each prospective juror be examined individually with the others absent "so that those who had specific knowledge of the crime would not contaminate the others' minds" was not an abuse of discretion.

5. **Arrest** ⇐70

Where defendant, while in Missouri, was advised that he was a suspect in a murder case, and when defendant was brought to Florida under a detainer related to an entirely different offense, although he was a suspect, he had not been charged with commission of any homicide nor had he been arrested for any new offense, it was not necessary to take him before a "booking officer" or a magistrate. 31 West's F.S.A. Rules of Criminal Procedure, rule 3.111(c).

6. **Criminal Law** ⇐412.2(4)

A request for counsel for an unrelated purpose is not sufficient to require interrogation to cease under *Miranda*.

7. **Criminal Law** ⇐1141.12

The ruling of trial judge that confession was freely and voluntarily made comes to the Supreme Court with the same presumption of correctness which attends jury verdicts and final judgments, the Supreme Court is not at liberty to substitute its views of the credibility or weight of conflicting evidence for that of trial judge and his ruling should not lightly be set aside.

APPENDIX A

8. Criminal Law ⇐517.2(3)

Defendant's confession of murder was not obtained in violation of *Miranda* under record indicating that defendant had been given *Miranda* warnings on no less than six different occasions and defendant confessed only after he flunked a lie detector test which he voluntarily took.

9. Criminal Law ⇐404(4), 486

In murder prosecution wherein the State attempted to demonstrate that defendant's statements as to how he struck the victim and what he did with the body were consistent with the evidence, the headless torso, identified as the victim, was found one fourth of a mile west of the bridge described in defendant's statement, the skull was found 150 to 200 yards west of the bridge, and skull was consistent not only with a white female of the victim's age but it showed trauma exactly where defendant admitted striking the victim, the pieces of bone, blood samples, and expert testimony relating to such exhibits were properly admitted.

10. Criminal Law ⇐338(1)

Any fact relevant to prove a fact in issue is admissible into evidence unless its admissibility is precluded by some specific rule of evidence.

11. Homicide ⇐228(1)

The corpus delicti in homicide cases consists of three elements: the fact of death, the criminal agency of another person as the cause thereof, and the identity of the deceased.

12. Criminal Law ⇐517.3(2)

Before a confession should be received in evidence, there must be some independent proof of the corpus delicti, either direct or circumstantial.

13. Criminal Law ⇐517.3(3)

Corpus delicti need not be proved beyond reasonable doubt as basis for admitting confession in evidence, but it is enough if evidence tends to show that crime was committed and only question is whether the evidence of corpus delicti is prima facie sufficient.

14. Constitutional Law ⇐266.1(1)
Criminal Law ⇐630(2)

Defendant charged with murder was not denied due process of law and a fair trial on ground that taped confessions were played to the jury before the State had established the corpus delicti of the crime, where fact of death was conceded and identity of deceased was demonstrated by most available evidence, considering the decomposition of the body, the body was the right size, color, and sex, examination of the body disclosed a laminectomy scar similar to operation the victim had undergone, and also a congenital abnormality of the 12th rib of the corpse correspondent to abnormality appearing in X ray of the victim, and evidence of foul play was sufficient to show that death was caused by criminal agency of another. U.S.C.A.Const. Amend. 14.

15. Homicide ⇐354

Where defendant was first taken into custody in Missouri after the United States Supreme Court had ruled that he had been improperly discharged by a federal district court from a sodomy conviction, defendant was detained by Missouri authorities at request of the state of Florida, and he was returned to Florida for purpose of serving such sentence, prosecuting attorney properly argued that defendant charged with murder was a person "under sentence of imprisonment," and trial judge properly found as an aggravating circumstances that the crime was committed "while the defendant was under sentence of imprisonment," despite contention that he was not under sentence of imprisonment at time of the homicide because he had been released by a federal court order. West's F.S.A. § 921.141(5).

16. Homicide ⇐354

Where trial judge in sentencing defendant for murder found aggravating circumstances that at time of the crime defendant had been previously convicted of more than one felony involving the use or threat of violence to some person, and that the murder was especially heinous, atrocious and cruel, inasmuch as trial court

found those other aggravating circumstances and no mitigating circumstances, death was presumed to be the proper sentence. West's F.S.A. § 921.141(5).

17. Homicide ⇐354

Defendant's claim that his use of beer and marijuana should have been considered in mitigation in prosecution for murder in the first degree was negated by testimony of witnesses who saw defendant at various times shortly after the homicide, and on each occasion, he seemed normal, not intoxicated, and his behavior in cleaning up the blood after the homicide, preparing to flee and leaving the area, demonstrated his awareness that his action was wrong, and he even discussed the fact that he was in trouble and the advisability of running away shortly after the killing.

18. Criminal Law ⇐884

The jury's recommendation of death upon conviction of first-degree murder is entitled to great weight.

19. Criminal Law ⇐1134(1)

Even though defendant confessed to murder in the first degree and even though he expressly desired to be executed, the Supreme Court nevertheless examined the record to be sure that the imposition of death sentence complied with all of the standards set by the Constitution, the legislature and the court.

20. Homicide ⇐354

Where defendant charged with murder in the first degree knew that he had been hospitalized and testified before the jury to that effect, there was nothing in record from which trial court could conclude that a mental examination would be appropriate, although defendant testified as to his use of beer and marijuana prior to the homicide, there were many witnesses who saw him at various times shortly after the homicide and on each occasion he seemed normal and not intoxicated, and reports furnished trial judge prior to sentencing included a psychiatric examination made in 1955 when defendant was 16 years of age from all of which trial judge found that capacity of defendant to appreciate criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired, so that death sentence was appropriate.

David J. Busch and Louis G. Carres, Asst. Public Defenders, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Charles W. Musgrove, Asst. Atty. Gen., Tallahassee, for appellee.

ADKINS, Justice.

This is a direct appeal from a judgment adjudging defendant guilty of murder in the first degree and a sentence of death.

On August 22, 1974, the victim, Jacqueline Smith, reported for work at a General Electric plant. Her hours were from 3:30 p. m. until midnight. She did not return from work and, after searching for her, Marvin Smith, her husband, notified police authorities. Later in the morning her automobile was found parked in a field near her home.

The defendant had been employed by the victim's husband in May 1974 to assist in the farming of his tobacco crop. At the time of the homicide defendant was staying with the Smiths in their home.

On September 1, 1974, a body was found in the Santa Fe River approximately one-fourth mile west of a bridge. The neck region and the head were missing, as well as the left upper extremity. The hand and right upper extremity were also missing. Dr. L. F. Beamer, a pathologist, identified the torso as being that of the victim by virtue of a laminectomy scar and an abnormality of the twelfth rib.

The defendant was involved in an accident in Missouri when a truck collided with the rear of his vehicle. Defendant was hospitalized and, while in the hospital, Missouri police officials arrested him on August 31, 1974. Florida had lodged a detainer against him because the state won an appeal relating to an earlier criminal conviction for sodomy and Florida officials wished to return him for the purpose of serving the remainder of his sentence.

A Florida officer met defendant in Missouri on September 4, 1974, and returned him to Florida. He was taken to Leon County Jail, then to the Lake Butler Reception and Medical Center for further medical treatment. This medical center is a part of the prison system of Florida.

Defendant was informed that he was a suspect in a murder case. Eventually defendant confessed, an indictment was returned, and, upon trial, defendant was found guilty of murder in the first degree. The sentence hearing resulted in a recommendation of death and the trial judge imposed the death sentence. This appeal resulted.

Defendant says that the court should have granted a change of venue on its own motion. Union County, the place of the homicide, was a small county in which two of the state's major penal institutions are located. Defendant contends that the jury venire was prejudiced because the prison system is the major source of revenue, directly or indirectly, for the residents of the county.

[1] During the trial, defendant did not file a motion for change of venue. This precludes appellate review, as the appellate court must confine itself to review of only those questions which were before the trial court and upon which a ruling adverse to the defendant was made. *State v. Barber*, 301 So.2d 7 (Fla.1974).

[2] Also, there is no provision by rule or statute for the court to change venue on its own motion. The defendant has the constitutional right to a trial where the offense occurred and a change of venue granted without an appropriate motion or the consent of the defendant is of doubtful validity. *North v. State*, 65 So.2d 77 (Fla.1952), *aff'd North v. Florida*, 346 U.S. 932, 74 S.Ct. 376, 98 L.Ed. 423 (1954). *See* also *Ward v. State*, 328 So.2d 260 (Fla. 1st DCA 1976).

[3] The record discloses that of thirty-seven prospective jurors only two were excused because they had formed an opinion. Twenty-three prospective jurors indicated that they had heard something about the case. There had been news coverage, but there is no indication that any of the coverage was prejudicial. The ease in selecting the jury is further evidence that a change of venue was not required. *See Gavin v. State*, 259 So.2d 544 (Fla.3d DCA 1972).

[4] During the voir dire examination, defense counsel requested that each prospective juror be examined individually with the others absent, "so that those who had specific knowledge of the crime would not contaminate the others' minds." The trial court did not commit reversible error in denying this motion. Such a request is addressed to the discretion of the court and the record fails to show an abuse of discretion. *Branch v. State*, 212 So.2d 29 (Fla.2d DCA 1968).

Defendant next contends that his confession was obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

At a hearing on the motion to suppress, it appeared from the testimony that defendant was first taken into custody in Missouri under the authority of a detainer lodged pursuant to section 941.45, Florida Statutes (1973). Defendant's conviction in another case had been affirmed on direct appeal. *Stone v. State*, 245 So.2d 91 (Fla. 1st DCA 1971), *cert. den.* 267 So.2d 329 (Fla.1972).

Defendant then sought and received relief in a federal district court and the United States Court of Appeals, Fifth District. *Stone v. Wainwright*, 478 F.2d 390 (5th Cir. 1973). The United States Supreme Court reversed the Fifth Circuit Court of Appeals. *Wainwright v. Stone*, 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973). It was subsequent to this holding that defendant's custody was sought by the prison officials of Florida.

The automobile accident in Missouri triggered a routine identification check and a Florida official was sent to Missouri to take custody of the defendant.

[5] Defendant, while in Missouri, was advised that he was a suspect in a murder case. When defendant was first taken to

the Leon County Jail (where he was held for five or six days until his admission to the Lake Butler Reception and Medical Center), he contends that he should have been taken before a booking officer as required by rule 3.111(c), Florida Rules of Criminal Procedure. Defendant was brought to Florida under a detainer related to an entirely different offense. Although he was a suspect, he had not been charged with the commission of any homicide nor had he been arrested for any new offense. Therefore, it was not necessary to take him before a "booking officer" or a magistrate.

Defendant was given *Miranda* warnings on no less than six different occasions. At 11:05 a. m., September 10th, he was first given the warnings. At this time, he waived his rights and did not ask for an attorney. He was again given the warnings at 1:40 p. m. on the same day, and once again defendant waived his rights and did not ask for an attorney.

On September 16th, the defendant voluntarily took a lie detector test, at which time his rights were explained to him again. He was also warned of his rights on the afternoon of September 16th. On September 18th, defendant was given *Miranda* warnings at 1:45 p. m. and 4:30 p. m. All of these warnings were read and reviewed with him, and he appeared to understand them.

There is evidence that defendant wanted to get in contact with an attorney during this period of time. The attorney had offices in Missouri and represented the truck driver involved in the accident in Missouri which resulted in the hospitalization of defendant. Defendant had received the attorney's card while he was in the Missouri hospital and indicated that he wished to contact the attorney so he could sue for a neck injury which he received in the accident. The record does not disclose that defendant requested counsel in connection with the homicide under investigation. At first, the defendant apparently was not worried about the murder charge. When defendant called an attorney after the confession, the call was made to this Missouri attorney.

Defendant alleged that he was told a court order required him to take a lie detector test. It was necessary to secure a court order in order to have the defendant released from jail, but defendant was told that he had a choice as to whether to take the test or not. The form delineating his rights, which was explained to him before he took the test, advised him that he did not have to take it. Defendant even admitted that he consented to take the lie detector test.

[6] A request for counsel for an unrelated purpose is not sufficient to require interrogation to cease under *Miranda v. Arizona*. This was the holding in *Hill v. State*, 429 S.W.2d 481 (Tex.Cr.App.1968), where the accused indicated that he was going to get counsel for an unspecified purpose. 1.

The law enforcement officers testified that defendant did not request consultation with an attorney before questioning on either September 16 or September 18, the days he admitted his guilt. Even had he requested consultation with an attorney, that would not prohibit a subsequent waiver. In *Nunez v. State*, 227 So.2d 324 (Fla. 4th DCA 1969), the court stated:

> Simply stated, the question is whether an accused in custody, having once made known his desire to have the assistance of counsel, may subsequently voluntarily waive such right.
>
> We think this question must be answered in the affirmative, because an accused in custody is just as much entitled to waive the constitutional rights outlined in the *Miranda* case as he is to insist upon them.

Just before the polygraph test, the defendant was given adequate *Miranda* warnings. The examination began at 10:30 a. m. and lasted about one and one-half hours. Within minutes after learning he flunked the test, defendant confessed

[7, 8] The ruling of the trial judge that the confession was freely and voluntarily made comes to this Court with the same presumption of correctness which attends

jury verdicts and final judgments. We are not at liberty to substitute our views of the credibility or weight of conflicting evidence for that of the trial judge and his ruling should not lightly be set aside. *Stanford v. State*, 110 So.2d 1 (Fla.1959). We hold that the statements were freely and voluntarily made and there were no *Miranda* violations.

[9] Defendant says he was denied due process of law and a fair trial because the trial court allowed into evidence pieces of bone, blood samples, and expert testimony relating to the exhibits. He contends that the evidence was not sufficiently tied to the offense and was produced solely for the purpose of prejudicing the jury.

The lengthy taped statement of the defendant contained the following:

> She walked around and got in on the passenger side and she did go around behind my car like that to get in. And she wasn't excited or nervous or none of that. And neither was I at the time but I was drinking that beer and smokin that marijuana and, uh, she said, you know, where we going. I said yeah, but you ain't going to like it. And she said, 'Well, I'm sure that you made up your mind that you are going to meet me,' she said, 'Everyone else meets me when I ask 'em to.' Now she did not mention no names or none of that and I said, well, just like I told you, I said, but you ain't going to like it. So I drove down,. I turned left down on Highway 18 and went down to this other road and turned right. There's a big long bridge there and it's a new black top paved road.
>
> . . . . .
>
> . . . So I went down that road there and I stopped in the middle of the bridge. I shut my lights off and I got out. The light did not come on in my car, you know, because I had a blowed fuse and I had wrapped it with tinfoil but my radio wouldn't even play. So, I get out and I walk around the car like this and I had the hatchet behind me like this. I opened the door for her, see, okay, she started to get out and I hit her in the head with the hatchet. Not the sharp point now, but the back of the hatchet.
>
> . . . . .
>
> She fell down. And I had, had trouble gettin' over the bridge. And the way I dumped her over the bridge, I had to get her feet up there first, you know, and keep inch up like that till I got her over the bridge.
>
> . . . . .
>
> . . . she had on a pair of shorts and I don't know if it was a blouse or a sweater. Now, that's all I can say but as far an anything else she did not have nothing, there was nothin' in my car that belonged to her.

The state attempted to demonstrate that defendant's statements as to how he struck the victim and what he did with the body were consistent with the evidence. The headless torso, identified as the victim, was found one-fourth of a mile west of the bridge described in defendant's statement. The skull was found 150–200 yards west of the bridge. Not only was the skull consistent with a white female of the victim's age, but it showed trauma exactly where defendant admitted striking the victim.

On the day the body was found (nine days after the homicide), a spot was found within the section of railing where defendant said he threw the body into the river. This spot was removed and a serologist was unable to determine the blood group factor. Also admitted into evidence was a blood sample secured from articles that had been in defendant's automobile. The defendant led the way to the discovery of this blood sample. These pieces of bone, blood samples, and expert testimony relating to such exhibits were properly admitted into evidence.

[10] It is a fundamental principle of evidence that any fact relevant to prove a fact in issue is admissible into evidence unless its admissibility is precluded by some specific rule of evidence. *State v. Wadsworth*, 210 So.2d 4 (Fla.1968); *Williams v. State*, 110 So.2d 654 (Fla.1959).

The condition of the skull corroborated the statement of the defendant, in that there was evidence of a trauma. In the opinion of an expert "an appreciably large amount of force" caused the trauma "at or near the time of death." The skull was admissible as being relevant in proving the manner in which the homicide was committed. *See Larmon v. State*, 81 Fla. 553, 88 So. 471 (1921), where the skull of the deceased was held admissible to show the course of the bullet.

The evidence of the blood stains and the testimony of experts met the test of relevancy and such evidence was properly admitted. Defendant's objections went primarily to the weight to be given to such evidence. This was for the jury, and the jury was fully apprised on the limitations of the probative value of such evidence.

Defendant next contends that the taped confessions were played to the jury before the state had established the corpus delicti of the crime and he was thereby denied due process of law and a fair trial.

[11] The corpus delicti in homicide cases consists of three elements: the fact of death, the criminal agency of another person as the cause thereof, and the identity of the deceased. *Lee v. State*, 96 Fla. 59, 117 So. 699 (1928).

[12, 13] The guidelines in determining whether the corpus delicti was adequately proved prior to the admission of the confession in the evidence are set forth in *Frazier v. State*, 107 So.2d 16, 26 (Fla.1958), as follows:

> It is true that before a confession should be received in evidence there must be some independent proof of the corpus delicti. *Parrish v. State*, 1925, 90 Fla. 25, 105 So. 130; *Keir v. State*, 1943, 152 Fla. 389, 11 So.2d 886. There should at least be some additional substantial evidence, either direct or circumstantial. *Tucker v. State*, 1912, 64 Fla. 518, 59 So. 941. The corpus delicti need not be proved beyond a reasonable doubt, but it is enough if the evidence tends to show that the crime was committed. *McElveen v. State*, Fla. 1954, 72 So.2d 785; *Graham v. State*, 1943, 153 Fla. 807, 16 So.2d 59. The only question is whether the evidence of the corpus delicti is prima facie sufficient to authorize the admission of the confession. *Nickels v. State*, 1925, 90 Fla. 659, 106 So. 479, supra; *Graham v. State*, supra. See Annotation: 45 A.L.R.2d 1316 (1954).

[14] The fact of the death was conceded and the identity of the deceased was demonstrated by the most available evidence, considering the decomposition of the body. *See Trowell v. State*, 288 So.2d 508 (Fla. 1st DCA 1973). The body was the right size, color, and sex. Examination of the body disclosed a laminectomy scar similar to an operation the victim had undergone. Also, a congenital abnormality of the 12th rib of the corpse corresponded to an abnormality appearing in an X-ray of the victim. The doctor identified the body of the deceased to a reasonable medical certainty. Also, there was proof that the shorts on the body were those of the victim.

The proof was more than adequate to show the criminal agency of another. The element need not be established beyond a reasonable doubt for the purpose of admitting a confession.

The victim "punched out" from work at midnight and, under ordinary circumstances, would have arrived home one-half hour later. She always returned home immediately after work and the record clearly shows that she was a good, hard-working woman. There is no evidence indicating or implying that she would enter the waters of the river in the middle of the night, naked from the waist up, and with her shorts and underpants partially removed. There were scuffle marks around her car. A broken key chain was found on the floorboard. The evidence of foul play was sufficient to show that her death was caused by the criminal agency of another. A sufficient predicate was laid for the introduction of the taped confession into evidence.

[15] During the sentencing procedure, the prosecuting attorney argued that defendant was a person "under sentence of imprisonment." The trial judge found as

an aggravating circumstance that the crime was committed "while the defendant was under sentence of imprisonment." § 921.-141(5)(a), Fla.Stat. (1973).

Defendant was first taken into custody in Missouri after the United States Supreme Court ruled that he had been improperly discharged by a federal district court from a sodomy conviction. Defendant was detained by the Missouri authorities at the request of the state of Florida, and he was returned to Florida for the purpose of serving this sentence. Defendant says that he was not under sentence of imprisonment at the time of the homicide because he had been released by a federal court order. The state contends that the legislature intended to cover persons under sentence of imprisonment, whether released by reason of bail, probation, parole, mandatory conditional release or otherwise.

The sole purpose of the federal proceedings in habeas corpus was to determine the legality of the restraint on liberty. *Fast v. Wainwright*, 310 F.Supp. 404 at 405 (So. Dist.Fla.1970), *aff'd* 439 F.2d 1162 (5th Cir. 1971). As long as the proceedings in federal court were pending, defendant was under sentence of imprisonment, and would remain so until the federal proceedings were concluded favorably to defendant. The final determination was that defendant be returned to custody.

[16] The trial judge also found the following aggravating circumstances:

> . . . B. At the time of the crime for which he is to be sentenced, the Defendant had been previously convicted of more than one felony involving the use or threat of violence to some person. C. The murder of Jacqueline Smith by the Defendant, Raymond R. Stone, was especially heinous, atrocious and cruel. D. The Court does not consider the remaining aggravating circumstances enumerated in Section 921.141(5), Florida Statutes, applicable to the Defendant. . . .

Inasmuch as the trial court found these other aggravating circumstances, and no mitigating circumstances, death is presumed to be the proper sentence. *State v. Dixon*, 283 So.2d 1 (Fla.1973).

[17] Defendant's claim that his use of beer and marijuana should have been considered in mitigation is negated by the testimony of witnesses who saw him at various times shortly after the homicide. On each occasion, he seemed normal, not intoxicated. His behavior in cleaning up the blood after the homicide, preparing to flee and leaving the area, demonstrate his awareness that his action was wrong. He even discussed the fact that he was in trouble and the advisability of running away shortly after the killing.

Defendant said that the victim parked her own car and joined him voluntarily, apparently for a dalliance. He prepared for the meeting by hiding a hatchet behind his back. He backhanded the victim at one point, making her nose bleed, then struck her several times over the head with the blunt side of the hatchet. To assure that she would have no chance of recovery, he threw her body into the river from a bridge.

[18] Defendant relies upon *Swan v. State*, 322 So.2d 485 (Fla.1975) to reduce the sentence to life imprisonment. In *Swan*, the defendant administered a severe beating to the victim before she died and this Court reversed a sentence of death. *Swan* involved a 19-year-old boy engaged in a burglary or robbery. The defendant Stone was 36. There was no indication that Swan used a deadly weapon. Stone used one. Swan's victim lived for a week while Stone inflicted a beating sufficient to kill. The previous record of Stone was more serious than that of Swan. Swan's jury recommended mercy while Stone's recommended death and the jury recommendation is entitled to great weight. *Tedder v. State*, 322 So.2d 908 (Fla.1975).

Also distinguishable is *Halliwell v. State*, 323 So.2d 557 (Fla.1975) where this Court reversed the death sentence imposed upon a defendant who had been convicted of murdering his paramour's husband. He beat the victim to death with an iron bar and dismembered the body after death. The victim in *Halliwell* had bragged about beat-

ing his wife and this triggered Halliwell's passion and provoked the fatal beating. Stone had no such excuse. Halliwell had no criminal record and was a highly decorated Green Beret. Stone spent most of his life in institutions.

In *Salvatore v. State*, 366 So.2d 745 (Fla. 1978), the defendant, with no significant criminal history, bludgeoned the victim to death then disposed of the body by dumping it at sea. The death sentence was held to be appropriate. Defendant Stone bludgeoned the victim to death and disposed of the body by dumping it in a river. He had a significant criminal history. Compared with *Salvatore*, the death sentence here was appropriate.

[19] Even though defendant confessed and even though he expressed a desire to be executed, this Court has, nevertheless, examined the record to be sure that the imposition of the death sentence complies with all of the standards set by the constitution, the legislature, and the Court. *See Goode v. State*, 365 So.2d 381 (Fla.1978).

[20] The sentence recommendation of the jury was rendered July 18, 1975. Sentence was imposed on October 1, 1975. On August 26th and September 2nd, 1975, defendant's trial counsel forwarded copies of psychiatric reports to the trial court which disclosed that defendant was admitted to the Farmington State Hospital on June 8, 1955, under the alias "Walter Herron." The case history of defendant included an incident which occurred when he was eleven years of age. At that time he and two other boys bound another child and threw the child into a river where he drowned. The diagnostic report revealed the following:

> Sociopathic youth from a deprived and depraved environment whose basic trust in others is so low that the possibility of an uneventful adjustment is considered very doubtful. He is considered to be of low average intelligence and in good contact with reality; however, his stated and perhaps fantasized revenge motives towards individuals and society are so malignant that he may constitute a grave danger to others upon his release from custody.

The hospitalization occurred between 1955 and 1958 and this remoteness seriously affects its use as a mitigating factor.

The defendant testified at the sentence hearing and stated that he had been in mental institutions at various times until he was 19 or 20 years of age. He relies upon *Messer v. State*, 330 So.2d 137 (Fla.1976) and *Miller v. State*, 332 So.2d 65 (Fla.1976) where we ordered new hearings for sentencing purposes because of failure to afford defense counsel an opportunity to present psychiatric testimony to the jury. The Court in the case sub judice did not declare the reports inadmissible. In fact, the reports had not been received and, therefore, could not be presented to the jury. Neither the judge nor defense counsel could be faulted for the absence of the reports at the jury phase of the sentence hearing.

Defendant knew he had been hospitalized and testified before the jury to that effect. *Stewart v. State*, 339 So.2d 710 (Fla.2d DCA 1976), involved a situation where the defendant did not inform counsel that he had been found criminally insane while using another name until after his conviction. Stewart is not applicable for it involved newly-discovered evidence while the instant case does not.

There is nothing in the record from which the trial court could conclude that a mental examination would be appropriate. Although defendant testified as to his use of beer and marijuana, there were many witnesses who saw him at various times shortly after the homicide. On each occasion he seemed normal, not intoxicated. Also, there is no evidence that defendant could not distinguish right from wrong. Quite the contrary, his behavior in cleaning up the blood, preparing to flee and leave the area, demonstrates his awareness that his act was wrong. According to the defendant's statement, he specifically discussed the fact that he was in trouble and the advisability of leaving town shortly after the killing.

The reports furnished the trial judge prior to sentencing included a psychiatric examination made in 1955 when defendant was sixteen years of age. At that time "it was felt that for some reason the patient was malingering in an effort to get a low grade, but that nevertheless he was mildly mentally defective." Three years later the staff diagnosis was "sociopathic personality without mental disease." On April 15, 1958, he was discharged from the hospital and transferred to the penitentiary. There is no evidence of mental illness. From these reports, his observation of the defendant, and the evidence produced in the case, the trial judge found that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired. In other words, the trial judge found no mitigating circumstances, so the death sentence was appropriate.

The defendant's attack upon the constitutionality of the Florida statute providing for the death penalty is without merit. *Proffitt v. State*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

We have reviewed the evidence to determine whether the interest of justice requires a new trial. No reversible error is made to appear and the evidence does not reveal that the ends of justice require that a new trial be awarded. We find that the judgment and sentence of the trial court in this cause is in accordance with the justice of the cause.

Accordingly, the judgment and sentence of the circuit court are hereby affirmed.

It is so ordered.

ENGLAND, C. J., and BOYD, OVERTON and SUNDBERG, JJ., concur.

Arthur R. POMPONIO, et al., Petitioners,

v.

The CLARIDGE OF POMPANO CONDOMINIUM, INC., etc., et al., Respondents.

No. 52812.

Supreme Court of Florida.

Nov. 15, 1979.

Rehearing Denied Jan. 30, 1980.

Condominium unit owners brought action against developer of condominium and lessors of recreational lease associated with the condominium. The Circuit Court, Broward County, John G. Ferris, J., granted unit owners' motion to permit payment of rents into registry of court and developer and lessors appealed. The Supreme Court, England, C. J., held that as applied retroactively, absent a lessor's express consent to its incorporation into terms of lease, statute providing for deposit of rent into registry of court during litigation involving obligations under a condominium lease, was invalid as an unconstitutional impairment of obligation of contract, inasmuch as such statute potentially allowed retention in court of at least some portion of deposited rent during entire term of litigation.

Order reversed and vacated.

Overton, J., concurred specially and filed opinion.

Adkins, J., concurred in the result only.

Alderman, J., dissented.

1. Constitutional Law ⇐18

State Supreme Court, when construing a provision of State Constitution, was not bound to accept as controlling United States Supreme Court's interpretation of the parallel provision of Federal Constitution.

2. Constitutional Law ⇐154(1)

Deposit into court of monies which one or another contract litigant may withdraw

TABLE OF CASES

Post Proffitt murder cases wherein the death penalty was imposed and the Florida Supreme Court passed upon the validity of the sentence	Whether the Trial Court found the aggravating circumstance "particularly heinous, atrocious and cruel"
Cooper v. State, 336 So.2d 1133 (Fla. 1976)	Yes
Meeks v. State, 336 So.2d 1142 (Fla. 1976)	No
Provence v. State, 337 So.2d 783 (Fla. 1976)	No
Knight v. State, 338 So.2d 201 (Fla. 1976)	Yes
Meeks v. State, 339 So.2d 186 (Fla. 1976)	No
Chambers v. State, 339 So.2d 204 (Fla. 1976)	Yes
Funchess v. State, 341 So.2d 762 (Fla. 1976)	Yes
Adams v. State, 341 So.2d 765 (Fla. 1976)	Yes
Burch v. State, 343 So.2d 831 (Fla. 1977)	Yes
Barclay v. State, 343 So.2d 1266 (Fla. 1977)	Yes
Elledge v. State, 346 So.2d 998 (Fla. 1977)	Yes
Aldridge v. State, 351 So.2d 942 (Fla. 1977)	Yes
Gibson v. State, 351 So.2d 948 (Fla. 1977)	Yes
Hoy v. State, 353 So.2d 826 (Fla. 1977)	Yes
Buckrem v. State, 355 So.2d 111 (Fla. 1978)	Yes
Raulerson v. State, 358 So.2d 826 (Fla. 1978)	Yes
Jackson v. State, 359 So.2d 1190 (Fla. 1978)	No
Washington v. State, 362 So.2d 658 (Fla. 1978)	Yes
Hargrave v. State, 366 So.2d 1 (Fla. 1978)	Yes
Salvatore v. State, 366 So.2d 745 (Fla. 1978)	Yes
Riley v. State, 366 So.2d 19 (Fla. 1978)	Yes
Jackson v. State, 366 So.2d 752 (Fla. 1978)	Yes
Smith v. State, 365 So.2d 704 (Fla. 1978)	Yes
LeDuc v. State, 365 So.2d 149 (Fla. 1978)	Yes
Mikenas v. State, 376 So.2d 606 (Fla 1978)	No
Menendez v. State, 368 So.2d 1278 (Fla. 1978)	Yes
Foster v. State, 369 So.2d 928 (Fla. 1979)	Yes
Kampff v. State, 371 So.2d 1007 (Fla. 1979)	Yes
Miller v. State, 373 So.2d 882 (Fla. 1979)	Yes
Ford v. State, 374 So.2d 496 (Fla. 1979)	Yes

Thomas v. State, 374 So.2d 508 (Fla. 1979)	Yes
Harvard v. State, 375 So.2d 833 (Fla. 1979)	Yes
Holmes v. State, 374 So.2d 944 (Fla. 1979)	Yes
Fleming v. State, 374 So.2d 954 (Fla. 1979)	Yes
Dobbert v. State, 375 So.2d 1069 (Fla. 1979)	Yes
Lucas v. State, 376 So.2d 1149 (Fla. 1979)	Yes
Rutledge v. State, 374 So.2d 975 (Fla. 1979)	Yes
Lewis v. State, 377 So.2d 640 (Fla. 1979)	Yes
Stone v. State, 378 So.2d 765 (Fla. 1979)	Yes
Clark v. State, 379 So.2d 97 (Fla. 1979)	Yes
Brown v. State, 381 So.2d (Fla. 1980)	Yes
Antone v. State, 382 So.2d 1205 (Fla. 1980)	Yes
Williams v. State, No. 50,666, 25 Fla. L.W. Sup. Ct. June 12, 1980	Yes
Shriner v. State, No. 51,749, 22 Fla. L.W. Sup. Ct. May 30, 1980	No
Downs v. State, No. 53,524, 22 Fla. L.W. Sup. Ct. May 22, 1980	No
King v. State, No. 52,185, 20 Fla. L.W. Sup. Ct. May 8, 1980	Yes
Magill v. State, No. 51,699, 20 Fla. L.W. Sup. Ct. May 8, 1980	Yes
Neary v. State, No 51,691, 20 Fla. L.W. Sup. Ct. May 15, 1980	Yes
Ross v. State, No. 52,929, 25 Fla. L.W. Sup. Ct. June 12, 1980	Yes
Gafford v. State, No. 48,421, 25 Fla. L.W. Sup. Ct. June 12, 1980	Yes

NOTE: Since Proffitt, the Florida Supreme Court has passed upon the validity of death sentences in 50 murder cases., In 43 of those cases, the Trial Court imposed the death sentence in whole or in part upon a finding that the murder was particularly heinous, atrocious and cruel. Of the sentences in those 43 cases, 28 were affirmed, 10 were reversed, and 5 were remanded for further consideration.